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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 )  
Amendment of Parts 21 and 74 )  
of the Commission's Rules With )  
Regard to Filing Procedures in )  
the Multipoint Distribution )  
Service and in the Instructional )  
Television Fixed Service )  
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and )  
 )  
Implementation of Section 309(j) )  
of the Communications Act - )  
Competitive Bidding )

MM Docket No. 94-131

DOCKET FILE COPY ORIGINAL

PP Docket No. 93-253

To: The Commission

REPLY COMMENTS OF CAI WIRELESS SYSTEMS, INC.

CAI WIRELESS SYSTEMS, INC.

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February 7, 1995

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REPLY COMMENTS OF CAI WIRELESS SYSTEMS, INC.

CAI Wireless Systems, Inc., by its attorneys, hereby submits its reply comments in the above-captioned Notice of Proposed Rulemaking ("NPRM").

INTRODUCTION

The comments previously filed in this proceeding mirror the NPRM. The comments contain, as did the NPRM, diverse and conflicting recommendations to advance the Commission's avowed goals of facilitating the development of the wireless cable industry and enhancing coordination in the processing of MDS and ITFS applications. Notwithstanding the breadth of proposals contained in the comments, widespread support by the wireless cable industry of several key aspects of the rulemaking is clearly evident. In addition, the comments of wireless operators plainly demonstrate that to achieve the goals the Commission has set for

itself, it must substantially overhaul its interference protection rules prior to the lifting of the freeze on filing MDS new station applications.

#### **I. CAI's Recommendations**

For the reasons set forth below, CAI supports the following MDS processing rule revisions:

1. The Commission should limit first window eligibility to those filers who can demonstrate control of twenty channels in urban markets or twelve channels in rural markets. Channels sought in this first "operator only" window would count toward the eligibility threshold.
2. The Commission should establish an "operator only" first window, regardless of whether an area-wide or site-specific licensing system is adopted in this proceeding.
3. The Commission should require long-form application filings when the window opens.
4. The Commission should adopt an MSA/RSA-based licensing system for remaining MDS spectrum.
5. The Commission should adopt new PSA definitions by acting on the Wireless Cable Association International, Inc.'s pending Petition for Partial Reconsideration in Gen. Docket No. 90-54.
6. The Commission should establish through a modified PSA definition, and possibly other rule revisions, a fair balance between the rights of incumbent "site specific" licensees and new area licensees.
7. Intra- and inter-MSA/RSA mutual exclusivities not resolved through negotiation should be awarded through an open outcry auction system.
8. The Commission should strictly enforce construction deadlines on all licenses issued under the new processing rules.

#### **II. The Commission Should Adopt a First Window Operators' Preference.**

The comments demonstrate widespread support for limiting a first window to entities that have acquired a "critical mass" of

channels. Plainly, there is both Commission precedent<sup>1/</sup> and ample judicial support<sup>2/</sup> for establishing threshold licensing eligibility criteria. Although the various proposals differ in their details, they are each crafted to identify those operators and those markets where there is a reasonable expectation that MDS licensing will lead promptly to the introduction or expansion of wireless cable service. Establishing threshold eligibility criteria will block those speculative, fraudulent and anticompetitive elements that have substantially impeded the wireless cable industry and its access to capital markets over the past decade.<sup>3/</sup> Accordingly, the crafting of these processing rules is the key component of this proceeding.

The Commission should establish first window eligibility criteria that reward efforts and not merely success. The barriers to channel aggregation have been high. Eligibility should cover both operators and those whose diligent efforts have brought them close to the "critical mass" of channels and system launch. Thus, for example, United States Wireless Cable, Inc.'s recommendation to limit a preference to "actual operators," i.e., those entities with operating systems, is too narrowly drawn. On the other hand, operating systems, regardless of the number of channels being used to serve a minimum number of paying subscribers, e.g., at least

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<sup>1/</sup> See 47 C.F.R. § 74.990(c) (commercial ITFS applicants must demonstrate minimum channel control).

<sup>2/</sup> See NPRM at para. 9; Hispanic Information and Telecommunications Network v. FCC, 865 F.2d 1289 (D.C. Cir. 1989); see also Comments of Crowell & Moring at 11-12.

<sup>3/</sup> See The Wireless Cable Association International, Inc. Comments at 15 n.33 ("WCAI").

100, must qualify for participation in the first window.

Based on its review of the comments filed in this proceeding, CAI is persuaded that a 20/12-channel large/small market threshold is the proper demarcation point for applicants which cannot establish eligibility on the basis of an operating system. The 20-channel limit should apply to all applications proposing to install transmitters within an MSA or within 15 miles of an MSA boundary. This definition is derived from Section 21.904(d)(5) of the Rules.<sup>4/</sup>

CAI reiterates its support for the other first window eligibility criteria set forth in its initial comments. The filer must be able to demonstrate control over the channels it claims as counting toward the aggregation threshold. The filer may be a licensee or excess capacity lessee, either directly or through a controlled affiliate. The Commission should permit filers to count three categories of controlled channels toward the channel threshold minimum. Licensed MDS and ITFS channels should be included. Channels proposed in cut-off applications against which no timely-filed competing applications are pending also should be counted.<sup>5/</sup> Finally, channels applied for in the first window

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<sup>4/</sup> CAI believes this large market definition is administratively simpler than the line-of-sight household measure proposed in its initial comments.

<sup>5/</sup> CAI agrees with the several commenters who would not exclude channels based on the pendency of petitions to deny. See WCAI Comments at 28; Joint Comments of ACS Enterprises, Inc., Baton Rouge Wireless Cable Television LLC, Cablemaxx, Inc., Multimedia Development Corp., Rapid Choice TV, Inc., Shreveport Wireless Cable Television Partnership, Superchannels of Las Vegas, Inc., Wireless Holdings, Inc. and XYZ Microsystems, Inc. (collectively, "Coalition of Wireless Cable Operators") at 15. CAI concurs with these commenters' (continued...)

should be counted toward the channel threshold.

CAI also agrees with American Telecasting, Inc. ("ATI") that the Commission should not limit eligibility on the basis of co-located channels. CAI, certainly a bona fide operator in a number of markets, has aggregated channels in other markets but, by necessity, is still in the process of co-locating various channels.<sup>6/</sup>

Moreover, CAI is not opposed to a requirement that the operator hold, as part of its 20/12 channel aggregation, four currently-authorized MDS and/or ITFS channels. This criterion is consistent with an eligibility standard based on demonstrated diligent efforts to acquire control over a substantial number of channels. Clearly, the Commission may reasonably rely on the application of this eligibility standard to conclude that all qualifying filers have the capacity to, at a minimum, launch a viable competitive multichannel video programming service following the grant of the channels sought in the window.

The NPRM presents the system operator preference as an alternative to the national filing window. CAI concurs with WCAI that the Commission should use a first "operator-only" window, regardless of the processing rules it adopts for the licensing of the remaining MDS spectrum.<sup>7/</sup> The new rules must create near-term

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<sup>5/</sup>(...continued)

insight that unless filers are permitted to include channels subject to petitions to deny these channels, the new processing rules may create incentives for filing anticompetitive strike pleadings.

<sup>6/</sup> See Comments of ATI at 14-15.

<sup>7/</sup> See WCAI Comments at 26.

licensing opportunities for bona fide operators. This can only be accomplished by concentrating limited agency processing resources on only those applications which hold a reasonable short-term opportunity for new or improved video programming services. An application filing system which cannot accommodate the spectrum needs of existing systems should be rejected on that basis alone.

The Commission's mandate is not to devise an application/auction process which maximizes revenues.<sup>8/</sup> Moreover, the hope of generating substantial revenues from MDS spectrum auctions is unrealistic.<sup>9/</sup> Much of the spectrum is already licensed and the Commission's interference rules limit the use of the remaining channels. Substantial market consolidation has been accomplished, and this process is continuing at a rapid pace.

At this point, particular channels are valuable to certain operators operating specific facilities in specific markets. Channels acquired under the proposed rules will be used to enhance competitive viability in the multichannel video programming distribution marketplace, not to establish a market position.<sup>10/</sup> Thus, unlike the cellular licensing lotteries or the PCS auctions,

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<sup>8/</sup> See WCAI Comments at 29-30; ATI Comments at 4-5.

<sup>9/</sup> See Comments of Coalition of Wireless Cable Operators at 6-9; ATI Comments at 5-10.

<sup>10/</sup> Of course, speculators, securities fraud artists and incumbent hard wire operators may find bidding on available frequencies attractive for purposes unrelated to the goals of the NPRM. Thus, it is critical that the Commission set the eligibility threshold high enough to block the unwanted participation of those with no interest in competing head-to-head with other video providers, but low enough to permit the participation of those filers with a realistic opportunity to acquire a "critical mass" of channels.



the new MDS rules will not be a determinative economic or regulatory event in the development of this industry. In PCS and cellular, winning applicants are able to develop commercially viable businesses. MDS auction spectrum, in contrast, will have virtually no intrinsic value because it will not, alone, permit a filer to launch a competitive multi-channel video programming service.

Not more than several filers will be able to use the spectrum available in any particular market, i.e., bona fide spectrum demand in the first window for the delivery of video programming services will be low. There also is a limited supply of spectrum remaining for application and auction. Therefore, CAI now believes that eligible applicants should file long-form applications when the first window is opened.

The Commission will not be deluged with applications at the first window if it adopts proper eligibility restrictions.<sup>11/</sup> The Commission should allow mutually exclusive filers an opportunity to negotiate settlements for a limited period of time following public notice of their application mutual-exclusivity. This process would cover both intra- and inter-MSA/RSA conflicts. Auctions, employing the open outcry method, should be held where voluntary resolutions cannot be achieved. This process should result in the Commission concentrating its licensing resources on those applications and

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<sup>11/</sup> CAI rejects ATI's recommendation that applications filed earlier in a window should enjoy superior cut-off rights to those filed later in the window. ATI comments at 13 n.21. The Commission would be well served simply to establish a one-day window if all applications filed during a longer window will not be accorded equal cut-off protection.

operators with the greatest promise of providing new MDS service to the public.

**III. The Commission Should License All Remaining MDS Spectrum on an MSA/RSA-Wide Basis.**

Most commenters support the retention of the Commission's site-specific licensing system. CAI concurs with most of these commenters to the extent that an area license approach cannot be adopted without both the development of adequate protection standards for incumbent "site-specific" licensees and the substantial overhaul of the current PSA definition. When coupled with these interference rule revisions, however, MSA/RSA-based licenses would provide operators with the greatest technical flexibility to engineer both current analog and future digital transmission systems.

CAI shares WCAI's alarm at the lack of specificity in the NPRM regarding the rights that would be afforded "area licensees" vis-a-vis the rights of existing operators.<sup>12/</sup> As the Coalition of Wireless Cable Operators notes, an area-wide licensing system could handcuff existing licensees' efforts to modify facilities.<sup>13/</sup> This opportunity for "greenmail" would, of course, fuel speculative interest in the new licenses.

The starting point for Commission action must be the modification of the PSA definition. The Commission must adopt rules which establish protected service areas which are coextensive

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<sup>12/</sup> See WCAI Comments at 37-40.

<sup>13/</sup> See Coalition of Wireless Cable Operators Comments at 8 n.7.

with the areas that can be reliably served with MDS authorizations. Moreover, the same protection standard must be applied to ITFS stations. CAI strongly supports WCAI's analysis of this problem and its proposed solution cure. An EIRP-based PSA boundary calculation is simple and certain, and an accurate predictor of a wireless operator's service area.<sup>14/</sup> This issue, however, falls substantially outside the scope of the NPRM. Thus, it is imperative that the Commission consider and act on the Petition of WCAI for Partial Reconsideration, Gen. Docket No. 90-54 (filed December 13, 1991) in connection with the issues raised by the NPRM. CAI urges the adoption of the WCAI proposal in its entirety.

With the adoption of a substantially enhanced PSA definition, operators will be on near-equal footing with area licensees. They will receive full protection for their licensed facilities. They also will have ample opportunity prior to the first window to file modification applications to protect contemplated future facilities. The complaint that area licenses might preclude future site-specific modification proposals rings hollow. It appears to be nothing more than a demand to bestow "area license" status on current MDS licenses.

CAI believes there is little likelihood that area licenses will "handcuff" operator modification plans, so long as first window eligibility is limited in the manner set forth above. Serious, competent operators will apply for remaining spectrum and negotiate with systems in neighboring areas to resolve potential interference conflicts.

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<sup>14/</sup> See WCAI Comments at 10-25.

In CAI's view, other criticisms raised against the MSA-based licensing approach simply miss the mark. WCAI's concerns about underinclusiveness and overinclusiveness can be addressed through the modification suggested above for the PSA definition and the filing of long-form applications during each window.<sup>15/</sup>

The Coalition of Wireless Cable Operators raises several additional concerns. They note that wireless cable employs a fundamentally different architecture than the low-powered cellular telephone and PCS services and, therefore, that it is impossible to fully serve an entire licensed area.<sup>16/</sup> In addition, according to the Coalition, the remaining spectrum "remnants" for which applications could be filed would not create viable systems.

The Coalition of Wireless Cable Operators has run together operational and application processing issues. The window is designed to facilitate the orderly processing and grant of MDS applications. CAI believes that the remaining spectrum in virtually all markets will have value to -- at most -- several operators and/or potential operators. In no area will an operator be able to create a viable wireless cable system solely on the basis of auctioned channels. Provided that proper eligibility criteria are adopted, the extent to which a filer can use spectrum efficiently throughout a MSA should not be a Commission concern. The auction process will identify the filer who places the highest value on the spectrum.

Moreover, ATI's comments should not persuade the Commission to

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<sup>15/</sup> See WCAI Comments at 36-38.

<sup>16/</sup> See Coalition of Wireless Cable Operators Comments at 6-9.

abandon its preferred area-based licensing approach. Most of ATI's criticisms are addressed above.<sup>17/</sup> ATI also argues that the Commission "will find the task of identifying channels and the areas where they are available for application to be vexing, inordinately time-consuming and arbitrary."<sup>18/</sup> This is not, however, the Commission's task. If CAI's proposal is followed, filers will be required to specify in long-form applications proposed facilities which meet all Commission technical requirements. By imposing a front-end long-form window filing requirement the Commission eliminates speculative and FCC resource-wasteful "we-don't-know-what's-left-but-we're-filing-an-application-just-in-case" applications for area licenses.

CAI remains convinced that MSA-based MDS licenses will maximize spectrum utility and operator innovation. This approach will reduce Commission processing burdens. It is particularly appropriate as digital transmission technologies approach commercial development. Both the Commission and operators would benefit from the adoption of flexible rules which could be used for

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<sup>17/</sup> See ATI's Comments at 17-20. (Area-based licensing is inconsistent with current allocation scheme. Area-based license filing will encourage speculation and serve false premise that MDS channels have value standing alone. Only long-form applications will disclose conflicts for the little available spectrum.)

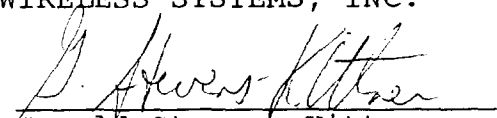
<sup>18/</sup> Id. at 19.

processing area license modification proposals. For all these reasons, the Commission should adopt an MSA/RSA-based licensing system.

Respectfully submitted,

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